JD(SF)-38-06
Anaheim, CA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO BRANCH OFFICE
DIVISION OF JUDGES

A AND G, INC., d/b/a ALSTYLE APPAREL

and Case 21-CA-37029

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL NO. 324, UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION

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DECISION

I. Statement of the Case

LANA H. PARKE, Administrative Law Judge. This matter was tried in Los Angeles, California on April 3 through 7 and 17 through 19, 2006 upon Complaint and Notice of Hearing (the Complaint) issued January 31, 2006[1] by the Regional Director of Region 21 of the National Labor Relations Board (the Board) based upon charges filed by United Food and Commercial Workers Union, Local 324, United Food and Commercial Workers International Union (the Union or the Charging Party). The Complaint alleges A and G Inc., d/b/a Alstyle Apparel (Respondent) violated Sections 8(a)(1) and (3) of the National Labor Relations Act (the Act). Respondent essentially denies all allegations of unlawful conduct.

II. Issues

1. Whether, at relevant times, Kiet Tuan Ly was a supervisor within the meaning of Section 2(11) of the Act.
2. Whether Respondent violated Sections 8(a)(3) and (1) of the Act in early August by transferring employee Kiet Tuan Ly from the second to the first shift.
3. Whether Respondent violated Section 8(a)(3) and (1) of the Act on August 18 by discharging employees Kiet Tuan Ly, Tuan D. Bui, Loi Tan Nguyen, Phuong Hoang Nguyen, Frankie Trinh, and Hung Vong.
4. Whether Respondent violated Section 8(a)(1) of the Act at various times in July and August by threatening employees with plant closure and job loss if employees selected the Union as their representative, by interrogating employees about their union activities and support, by engaging in surveillance of employees' union

[1] All dates herein are 2005 unless otherwise specified.

activities, and by otherwise interfering with, restraining and coercing employees in the exercise of their Section 7 rights by the following conduct: checking identification badges of and yelling at employees who took union flyers and directing employees not to take union flyers.

5. Whether an appropriate remedy would include an order for Respondent to read any notice to convened employees as follows: Ted Olea, Human Resources Director, in English; Grace Au, Human Resources Representative, in Vietnamese; Joaquim Orriols, General Manager, in Spanish.

III. Jurisdiction

At all relevant times, Respondent, an Illinois corporation, with its principal place of business, offices, and a facility at 500 East Cerritos Avenue, Anaheim, California (the facility) has been engaged in the business of manufacturing clothing. During a representative 12-month period ending December 14, Respondent derived gross revenues in excess of $1,000,000 and purchased and sold and shipped from the facility goods valued in excess of $50,000 directly to points outside the State of California. Respondent admits, and I find, it has at all relevant times been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and the Union is a labor organization within the meaning of Section 2(5) of the Act.[2]

IV. Findings of Facts

A. Respondent's Business

Respondent's facility is a multistructure compound fronting on Cerritos Avenue in Anaheim, California, with a rear entrance off Claudia Street. Respondent stations security guards at both the front and rear entrances to check in visitors and employees, the latter of whom wear identification badges. Respondent maintains a canopied smoking/break area at the front of the facility's East building from which the front entrance can be seen.

Respondent primarily manufactures tee shirts, producing both fabric and finished product during the course of three shifts: the first shift, 6 a.m. to 2 p.m., the second shift, 2 p.m. to 10 p.m., and the third shift, 10 p.m. to 6 a.m. During the relevant period, Respondent employed 600 workers at the facility in its knitting, dying, cutting, sewing, and shipping departments. In Respondent's knitting department, the tee shirt fabric is produced by machines of varying size and complexity, all of which weave fabric from spools of thread or yarn. The thread, which may vary in texture, is wrapped around cardboard cores called cones. Both cones and thread scraps fall to the floor during production and are swept up and disposed of by cleaning employees. At all times relevant hereto, the following management structure, in pertinent part, has existed at Respondent:

Ted Olea (Mr. Olea)	Human Resources Director
Joaquim Orriols (Mr. Orriols)	General Manager
Alfonso Doroteo (Mr. Doroteo)	Knitting Department Supervisor
Grace Au (Ms. Au)	Human Resources Representative
Akhtar Kahn (Mr. Kahn)	Chief of Safety

[2] Where not otherwise explained, findings of fact herein are based on party admissions, stipulations, and uncontroverted testimony.

During the relevant period, about 90% of the employees in the knitting department were Vietnamese speaking.[3] All alleged discriminatees named below, except Kiet Tuan Ly,[4] worked in the knitting department on the second shift:

Kiet Tuan Ly (Mr. Ly)	Tuan D. Bui (Mr. Bui)
Loi Tan Nguyen (Loi Nguyen)	Frankie Trinh (Mr. Trinh)
Hung Vong (Mr. Vong)	Phuong Hoang Nguyen (Phuong Nguyen)

Mr. Ly worked as a shift leader, Phuong Nguyen as a mechanic, and the others as machine operators.

B. Supervisory Status of Kiet Tuan Ly

Respondent employed shift leaders for each of the knitting department shifts. During July and August Carlos Galan (Mr. Galan), Anthony Trinh, and Mr. Ly served as knitting department shift leaders. Mr. Ly was shift leader for the second shift until sometime prior to August 12 when he was transferred to the first shift. The shift leaders reported to Mr. Doroteo, who in turn reported to Mr. Orriols. The parties stipulated that Mr. Ly did not have the authority to hire, transfer, suspend, layoff, recall, promote, discharge, reward, or adjust grievances or to effectively recommend any of the foregoing. In issue is whether Mr. Ly had the authority to assign, discipline, or responsibly direct employees or effectively to recommend such actions within the purview of Section 2(11) of the Act. The evidence establishes that Mr. Ly had the same authority as the other shift leaders, and the following findings are an amalgam of Mr. Orriols' and the shift leaders' testimony as to shift leader authority.

During the relevant period herein, each employee in the knitting department was responsible for the operation of as many as five machines. Mr. Orriols trained the shift leaders on how to work with employees, how to find out which machine employees felt comfortable with, and how to make the assignments, as appropriate assignment is crucial to production. According to Mr. Orriols, he "spent a lot of hours every day teaching…the area of the assignment."

On a daily basis, Mr. Orriols determined which machines should be run by assessing production needs and machinery operational availability. Prior to the beginning of each shift, Mr. Orriols provided the shift leaders with preprinted forms he had prepared entitled Machine Assignment Form on which were listed the machines that were to be run that shift. The shift leaders utilized the form and their knowledge of the capabilities of each worker to assign the machines.[5] According to Mr. Orriols, once a shift leader knew his coworkers' experience, machine assignment was an easy matter. If an employee complained that the machine assignment was too much for him, the shift leader reduced the number of machines assigned and discussed the matter with Mr. Orreals the next day. In the last three years, five or six employees have complained to Mr. Orriols about their machine assignments. On those occasions, Mr. Orriols met with the employee and the shift leader to resolve the problem.

[3] As needed, Ms. Au translated for Respondent's managers/supervisors in communications with Vietnamese employees.

[4] As detailed below, by early August Respondent had transferred Mr. Ly from the second shift to the first shift.

[5] Mr. Ly testified, contrary to Mr. Orriols, that Mr. Orriols told him which employees to assign to the machines. I do not credit Mr. Ly's testimony in this regard, as it is inconsistent with statements in his prehearing affidavit.

After assigning machines, the shift leaders oversaw the work of and instructed and assisted other employees in operating their machines. As needed, they filled in for absent machine operators. The shift leaders monitored safety compliance and productivity.

The shift leaders were expected to report to management such employee infractions as not keeping the work station clean or safety breaches. Mr. Ly's signature appears along with those of admitted supervisors on certain documented disciplinary actions for knitting department employees. However, Mr. Ly had no authority to issue oral or written warnings and was not consulted before imposition of such.[6] Should a disciplinary issue arise, Mr. Orriols expected Mr. Ly to make a note of the situation and leave it on his desk. In unusual situations, Mr. Ly could send an employee home and review the matter with Mr. Orriols the next day. Mr. Ly could also permit an employee to leave early, following the same notification procedure.

Mr. Orriols determined when overtime would be worked, what work would be done, and the number of employees necessary. When notified by Mr. Orriols that overtime workers were needed, the shift leaders chose those employees capable of running the machines to be operated during overtime. There is no evidence as to whether employees could decline or protest overtime; at times, overtime was assigned on a voluntary basis, but the record is unclear as to the frequency or circumstances of voluntary versus involuntary overtime.

C. The Union campaign—July and August 2005

In July, the Union conducted an organizational campaign at Respondent's facility, passing out flyers and union materials and talking with employees on the following dates:

July 15: Union Representatives passed out flyers, in English and Spanish, with attached union authorization cards to Respondent's employees at the front and rear entrances to Respondent's facility from about 1:30 to 3:00 p.m. Mr. Ly witnessed the handbilling as he stood with Mr. Doroteo at the lunchroom door. Mr. Ly told Mr. Doroteo that he wanted to pick up some flyers; Mr. Doroteo shook his head and said that the Union was no good. After Mr. Ly obtained flyers, he distributed three in the smoking area and two more inside the plant. Mr. Doroteo stood nearby as Mr. Ly gave out flyers inside the plant and again shook his head and said the Union was no good.

Between 1:30 and 2:00 p.m., 20-40 employees congregated in the smoking area near the front entrance. Mr. Olea, Ms. Au, Mr. Orriols, and Mr. Doroteo stood at the facility's front door, a location from which the handbilling and the smoking area were visible. While they were there, a number of employees obtained flyers from the union representatives. Mr. Vong, Mr. Trinh, and Loi Nguyen distributed flyers to employees in the smoking area. Mr. Ly and Mr. Vong translated the flyer information for employees, and Mr. Vong encouraged them to sign and return the authorization cards.

A couple of days later at quitting time, Loi Nguyen solicited another employee to sign an authorization card while Ms. Au watched from nearby.

[6] No examples were given of Mr. Ly's handling any employee discipline, but Martin Bui cited the following example of how, as a shift leader, he would handle a disciplinary matter: "…if that employee [left early], I would write a note and give to Ms. Grace and it depends on her decision. She would inquire how often would this person do that…she would say, today or tomorrow, get that person to come up to the office and talk to her."

August 8: Union representatives passed out flyers cum union authorization cards in English, Spanish, and Vietnamese to many of Respondent's employees at the front and rear entrances to Respondent's facility during three separate two-hour periods: 5:15 a.m., 1 p.m., and 9 p.m. On this day or on August 12, Ms. Au stood at the front entrance for about 20 minutes looking in the direction of the handbilling before obtaining a flyer from a union representative. Mr. Vong and Loi Nguyen received flyers from union representatives and passed them out to employees in the smoking area while Mr. Olea, Mr. Orriols, and Mr. Doroteo, inter alia, stood outside the front entrance to the facility. Phuong Nguyen distributed flyers to fellow workers at the smoking area until he saw Mr. Olea looking directly at him whereupon he put the flyers down. Mr. Bui distributed flyers to coworkers and urged them to sign authorization cards, as Ms. Au stood two to three feet away. Mr. Trinh distributed flyers to employees in the smoking area and urged them to sign authorization cards. When Mr. Trinh entered the facility, he gave a flyer to Mr. Doroteo and recommended he sign it to get a salary raise.

According to Mr. Ly, Dung Nguyen[7] gave a flyer to Mr. Ly inside the plant. Seeing Mr. Ly with the flyer, Mr. Olea asked him what he had. When Mr. Ly replied, "Nothing," Mr. Olea moved on. Mr. Olea denied ever asking any employee what he/she held and could not recall seeing Mr. Ly with a flyer but pointed out that "everybody had flyers at one time or another." In the absence of clear recall by Mr. Olea, I accept Mr. Ly's testimony.

August 12: Union Representatives again passed out flyers to Respondent's employees at the front and rear entrances to Respondent's facility. This flyer was headed, "Alstyle doesn't care about its workers" and detailed five employee complaints regarding extreme heat in the plant, failure to get breaks and lunches, unpaid overtime, absence of raises, unfair termination after job injury, and suspension for missing work. Two of the complaints read as follows:

> I don't always get paid for my overtime and in two years I have never received a raise. -Worker in cutting
>
> I couldn't work on Saturday. When I showed up to work on Monday, they sent me home. That's not fair. -Worker in Knitting

August 24: Following Respondent's August 18 discharge of six employees, union representatives along with a number of the discharged employees, passed out flyers at the facility addressing the terminations and urging solidarity under union aegis.

D. Alleged 8(a)(1) Conduct

1. Respondent's Meetings with Employees

a. The July 20 Meeting

On about July 20, Respondent held dual-session meetings with the second shift of its knitting department employees. Present at each session were Ms. Au and two labor consultants, Gus and Carlos Flores, whom Respondent had hired to present Respondent's opposition to the Union. It is undisputed that the two consultants acted as Respondent's agents

[7] During the testimony a number of references were made to an employee named "Dung Nguyen." Respondent's records show only one employee with the name of "Dung Nguyen" (surnamed "Nguyen") employed during the relevant period on the knitting department's second shift. Accordingly, I have herein referred to "Dung Nguyen" as "Dung Nguyen."

in the presentations. Gus Flores spoke to the employees about the union campaign while Ms. Au translated. Neither of the consultants nor Ms. Au testified. As recollections by the General Counsel's witnesses of what was said varied, each account is summarized below:

Mr. Vong. Mr. Vong attended the first session. In speaking to employees, the consultant sometimes looked into his "notes or his books." Gus Flores said that if the Union could obtain signatures of 30% of Respondent's employees authorizing it to represent the workers, the Union could then seek an election through the federal government. If the Union won the election, bargaining might result in a strike by employees and sometimes a strike can cause a company to close its business.[8] During the Savon and Albertson labor dispute, employees returned from strike to find their jobs were being worked by other employees and so they lost their jobs.

During the meeting, Mr. Vong asked about overtime and double-time wages; Mr. Bui asked how the Union knew about the company, and Mr. Trinh asked why he had not been given a raise during his two years of employment.

Phuong Nguyen: Phuong Nguyen attended the first session. Gus Flores told the employees that the Union was an organization to represent employees, but its objective was to obtain money from initial fees and monthly dues. If the Union could get 30% of the employees to sign authorization cards, the Union could get the federal government to conduct an election. If the Union won the election, it would sit with the employer to talk. If the two sides could not resolve issues, and he was sure that the employer would never agree to employee demands,[9] then a strike would occur, and if employees went on strike, it might come to the point that the company would be closed for business. The consultant mentioned that Vons and Savon had a strike in California, during which employees lost their jobs, their families broke down, and there was no happiness. The Union, he said, will not bring any happiness to the employees.

Loi Nguyen: Loi Nguyen attended the second session. Gus Flores said that if employees joined the Union and went on strike, when they returned to work, Respondent could have hired other employees already, and that would mean they would lose their jobs; it would be stupid to go on strike. Loi Nguyen recalled that Mr. Trinh and Mr. Vong asked why they never got raises and complained that the machines ran too fast; Mr. Bui asked an unspecified question.

Mr. Bui: Mr. Bui attended the first session. Gus Flores said, in pertinent part, that if the Union entered into the company, it would have to lay off a certain number of employees and, as the

[8] Mr. Vong was not entirely clear as to what the consultant said about the company closing its business. He first testified that the consultant "meant" that Respondent would close if a strike occurred, then he testified that the consultant had actually said as much. Upon further questioning, Mr. Vong said the consultant warned that the company could close the business if employees went on strike. Mr. Vong also testified that he vaguely recalled the consultant saying something about the company closing if employees voted in the Union but could not remember specifics. I give no weight to Mr. Vong's vague and inconsistent testimony about Gus Flores' plant closure statements.

[9] No other employee testified that Respondent predicted futility of bargaining, and the General Counsel did not allege such. I do not, therefore, credit Mr. Phuong Nguyen's testimony that Gus Flores said Respondent would never agree to employee demands.

last step, close business. Under cross examination, Mr. Bui testified that his earlier testimony regarding company closure related to Gus Flores' comment about some grocery store employees who went on strike and lost their jobs.[10]

Mr. Trinh: Mr. Trinh attended the first session. Although Mr. Trinh's testimony was somewhat confused, the gist of it was that Gus Flores told the employees that a strike would lead to a situation where Respondent would have to close its business.[11] During the question/answer period, Mr. Trinh asked why he had not received a raise in two years.

b. The August 16 Meeting

On August 16, Respondent held a meeting with the knitting department second shift employees.[12] In the meeting, Mr. Olea described the information in the union flyers entitled "Alstyle doesn't care about its workers," as lies.[13] He told employees, "It is time that you stand up and tell the Union that Alstyle cares for its employees and that you do not need them to talk for you."

During the question/answer period that followed, Mr. Trinh loudly asked Mr. Olea why he had not received a raise in almost two years and said he did not trust him any more. Mr. Vong complained that the company suspended employees unfairly and referred to a three-day suspension he had been given in June for a three-hour unauthorized absence. Mr. Vong asked why the company had punished him with the unpaid suspension. Mr. Olea told Mr. Vong to see him after the meeting. Several employees, including, Phuong Nguyen, Loi Nguyen, Dung Nguyen, Hao ____, Mr. Bui, and Mr. Trinh urged Mr. Vong to demand an immediate answer while Mr. Olea watched their discussion. Mr. Vong and Mr. Trinh insisted that Mr. Olea answer at once. According to Mr. Olea, Mr. Trinh "was yelling and screaming that [Mr. Olea] should go get the file," accused Mr. Olea of lying, and turned his back on him to speak to the group of employees. Mr. Olea was frustrated, believing that Mr. Trinh was causing him to lose control of the meeting by his "ridiculous question." Mr. Olea left the meeting and obtained Mr. Vong's personnel file.

Upon returning with Mr. Vong's file, Mr. Olea addressed Mr. Vong and the group, saying that because Mr. Vong had previous unexcused absences, his latest absence merited a three-day suspension. Mr. Olea said that Mr. Vong should have been terminated for attendance and that he was lucky he was still there.

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[10] I give no weight to Mr. Bui's vague and inconsistent testimony about employee layoff and plant closure statements.

[11] As with Mr. Vong and Mr. Bui's testimony, Mr. Trinh's testimony was too unclear to permit a finding that Gus Flores warned of company closure in the event of a strike.

[12] Witness accounts of this meeting varied, but witnesses generally corroborated one another in relevant details. The following account is an amalgam of the testimony.

[13] Witnesses described Mr. Olea as loud, angry, and red-faced. Mr. Olea agreed he was "animated" about the flyer.

On August 18, Mr. Olea placed a memo in Mr. Trinh's file to the effect that Mr. Trinh had been insubordinate and disrespectful during the August 16 meeting, "inciting the group, trying to get the group to revolt," which behavior was "not acceptable."[14]

2. Alleged Interrogation, Surveillance, and Coercion

Sometime in July or August, Ms. Au had a conversation with Martin Bui, assistant shift leader, and Mr. Ly in Respondent's lunchroom. She told the two men that if the Union came into the company, she would resign and Respondent would close the business and move to Mexico where it already had a facility.[15]

On August 8, Mr. Kahn approached union representative Matthew Bell (Mr. Bell) as he passed out flyers at the front entrance of the facility and asked what lies the Union was telling employees. When Mr. Bell responded, Mr. Kahn said loudly, "F___ off, F____ you, F___ you, what are you going to tell these employees when the Union comes in, and the company has to leave? What will you tell the workers then?" About five to six employees stood a short distance away by the office door.[16]

In early August at about 10 p.m., as Mr. Vong and Dung Nguyen sat together at a table in the smoking area, Ms. Au approached them.[17] Mr. Vong testified that Ms. Au asked if he had signed a union card, to which Mr. Vong answered he had both signed and sent it. Ms. Au said employees should think very carefully before sending the cards. Mr. Vong's account of this event in his prehearing affidavit of September 29 differs from his testimony at the hearing. In his prehearing affidavit, Mr. Vong said he volunteered the information that he had signed a union card after Ms. Au cautioned employees to think carefully before sending cards to the Union. Mr. Vong gave another affidavit on March 22, 2006, shortly before the hearing, in which he revised his earlier affidavit testimony to accord with that given at the hearing. Loi Nguyen testified that he overheard Ms. Au ask Dung Nguyen, not Mr. Vong, if he planned to send an authorization card to the Union. The testimony of Mr. Vong and Dung Nguyen presents some clear credibility problems: (1) whether Mr. Vong's second affidavit and hearing testimony reflect a sincere and reliable revision of inaccurate testimony or a recent fabrication; (2) whether the inconsistency between Mr. Vong and Loi Nguyen's testimony as to whom Ms. Au directed her

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[14] Although Mr. Olea's professed perception was that Mr. Trinh was "yelling and screaming," the evidence as a whole, including Mr. Olea's failure to address Mr. Trinh's behavior except for the belated memo to his file, does not support his testimony. While employees were undeniably loud and assertive in the meeting, Respondent does not argue that their behavior warranted discipline, and I find no evidence of misconduct.

[15] Ms. Au, who has not worked for Respondent since December, was subpoenaed by Respondent. Respondent represented that she appeared on the first day of the hearing but declined to attend thereafter; she did not testify. The substance of this conversation is based primarily on the testimony of Mr. Ly. Martin Bui, currently employed by Respondent, testified regarding the interchange. He was a reluctant witness, and although he stated he was unsure about the exact words Ms. Au used, his testimony essentially corroborated Mr. Ly's.

[16] Mr. Kahn denied making any such statement. I found Mr. Bell to be a sincere and truthful witness, and I credit his testimony.

[17] Respondent introduced into evidence Ms. Au's July/August timecard, which showed she was not on the clock at any time after 6:00 p.m. Respondent asserts in its post-hearing brief that the time clock records show Ms. Au was not at the Facility at 10:00 p.m. during that period. While the timecard evidence establishes that Ms. Au was not then on the clock, the evidence does not preclude her having been at the facility at times when she was not on the clock.

question fatally damages the credibility of both witnesses. In resolving the problems, I have considered that I found both witnesses to be forthright and clear in testifying of this incident, and I have also taken into account the absence of refutative evidence from Ms. Au. I find, therefore, that although Loi Nguyen does not agree with Mr. Vong's identification of the person to whom Ms. Au's question was addressed, his testimony otherwise corroborates Mr. Vong's, and I accept Mr. Vong's revised account.

On August 24, while union representatives and discharged workers passed out flyers at the front entrance, some employees on break talked with their former coworkers through the perimeter fence. As they did so, security guard Antonio Leonor, Jr. (Mr. Leonor) yelled at them to get away from the fence. Mr. Bell told Mr. Leonor that what he was doing was illegal. Mr. Leonor grabbed the identification badge of two workers, looked at them (presumably to see the workers' names), and, in one instance, wrote on a paper.[18]

E. Alleged 8(a)(3) Conduct

1. Transfer of Kiet Tuan Ly

In early August, Ms. Au and Mr. Orriols met with Mr. Ly and Anthony Trinh to inform them that they were to exchange shift leader places.[19] Mr. Ly was to assume Anthony Trinh's first shift duties and Anthony Trinh was to take Mr. Ly's place as the second shift leader. According to Mr. Ly, Mr. Orriols told him that he would be transferred from the second to the first shift to improve first shift production. According to Mr. Orriols, he transferred Mr. Ly to the first shift because Mr. Ly's production, energy, and "passion" were "completely down…All of a sudden, the energy was not there," and the production of the second shift dropped.[20] Mr. Orriols hoped that placing Mr. Ly on the first shift would permit Respondent to teach him a little more and to bring him back to the original energy. Mr. Orriols testified that he told both Mr. Ly and Anthony Trinh that second shift production was down, that Mr. Ly's energy level was not the same as formerly, and that he was being transferred to permit him to regain his "passion

[18] Mr. Leonor testified that he "did not think" he told any employees they were not to take flyers, and he denied checking any identification badges except when employees entered work. I found Mr. Leonor's testimony to be somewhat vague and overall unconvincing, and I credit other witnesses' accounts over his.

[19] It is not clear when Respondent made the transfer. Mr. Ly puts it after the second union handbilling, August 8. In its post-hearing brief, Respondent refers to Mr. Ly having been transferred from the second shift "for a few weeks" as of August 18. The transfer may have taken place before August, but in conformity with Mr. Ly's testimony, I have referred to it as occurring in early August.

[20] Mr. Orriols' testimony was equivocal on this point, as he also testified that there had not been much of a change in Mr. Ly's performance prior to the transfer. Respondent presented no substantiating evidence as to decreased production.

of working close to [Mr. Orriols] and with [Mr. Doroteo]." According to Mr. Orriols, both Mr. Ly and Mr. Anthony Trinh felt the challenge was "great" and were happy with the changes.[21] Mr. Ly commenced first-shift lead duties on the following day. [22]

In determining whether to credit Mr. Ly or Mr. Orriols' account of what Mr. Ly was told about the transfer, I have considered the following factors as well as witness manner and demeanor: Mr. Orriols' equivocal testimony as to Mr. Ly's performance, the lack of any corroborative evidence to substantiate decreased second-shift production, and the inherent improbability that Mr. Ly would be "happy" and feel the "challenge was great" upon being told his production and performance were so lacking as to necessitate a transfer. Further, Ms. Au testified at a December 1 Unemployment Insurance Appeals Board hearing that Mr. Ly had been transferred because the first shift had some problems, which suggests that her understanding of the transfer's purpose coincided with Mr. Ly's.[23] Accordingly, I accept Mr. Ly's account of what Mr. Orriols told him and find that Mr. Orriols told Mr. Ly he was being transferred to the first shift to improve production there.

2. August 18 Discharges of Tuan D. Bui, Loi Tan Nguyen, Phuong Hoang Nguyen, Frankie Trinh, and Hung Vong

Respondent presented three witnesses who testified they saw certain employees playing a form of soccer during work time in July/August. All three served as shift leaders during the relevant period. Their testimony is summarized as follows:

Carlos Galan: According to third-shift leader, Carlos Galan (Mr. Galan), on three occasions he observed certain employees playing soccer in an aisle between the machines during work time. Mr. Galan testified that the soccer playing occurred between 8:00 and 8:45 p.m., a time that coincided with shift leaders leaving the production floor for a daily 9:00 p.m. meeting with fixers to discuss machinery problems that lasted for 10-15 minutes (the fixer meeting).[24] Mr. Galan's description of the soccer playing was somewhat vague: "…they would play soccer…with the balls of the yarn…and sometimes, they would grab cones[25] that were there as well…they would use cones, one on each side…there were five playing, sometimes." The playing occurred during periods where the employees were also operating their machines. The playing lasted only "minutes" in Mr. Galan's estimation; when the players saw anybody looking

[21] Anthony Trinh agreed that following his transfer, Mr. Ly was "happy and smiley."

[22] Respondent argues in its post-hearing brief that Mr. Ly gave contradictory testimony of what Mr. Orriols told him in the transfer discussion. Mr. Ly initially testified that Mr. Orriols told him that he would be transferred because Respondent needed "a good person in first shift because the first shift has a problem in production." Under cross-examination, Mr. Ly testified that Mr. Orriols told him he needed a good worker to help in the first shift, which Mr. Ly understood to mean that he would move to the first shift to help those operators who were performing weakly or poorly. I find Mr. Ly's testimony in direct and cross examination consistently avowed that Mr. Orriols said the purpose of the transfer was to improve first shift production.

[23] This finding is based on Mr. Ly's testimony. Although the transcript of the unemployment proceedings was not received into evidence, it was available for cross-examination; Respondent did not cross-examine Mr. Ly as to his testimony in this regard.

[24] Mr. Galan often arrived at work prior to the third shift to prepare and to attend the 9:00 p.m. fixer meeting.

[25] Cones are the spindles on which the manufacturing thread is wrapped.

at them, they scattered back to their machines.[26] The first time, on an unknown date, Mr. Galan recalled Loi Nguyen, Mr. Bui, Phuong Nguyen, Mr. Vong, and (he believed) Mr. Trinh playing. Mr. Galan told Mr. Ly to be careful, to control his staff, and to avoid accidents. Mr. Ly said not to worry, that he would handle things his own way. Sometime in July, Mr. Galan observed the same employees playing soccer a second time and spoke to Mr. Ly, who said he would take the issue under consideration. Mr. Galan also told Mr. Trinh that he could not play inside the plant for safety reasons. Mr. Galan testified that his third soccer sighting occurred on Friday, August 12, as "we were about to close."[27] According to Mr. Galan, he saw the same employees playing in the same location in the same manner as the previous two times. Mr. Galan saw Mr. Trinh throw away a ball of wound-up thread. Mr. Galan retrieved the ball from the trash along with a smaller thread ball he found there (the thread balls). The larger ball was about half the size of a regulation soccer ball and, Mr. Galan said, could only have been created by unwinding the thread from a cone; the smaller was about the size of a tennis ball. According to Mr. Galan, Martin Bui and Anthony Trinh told him they had seen the five employees playing with the smaller thread ball "before."

Martin Bui: During relevant periods of July and August, Martin Bui was assistant shift leader for the second shift; he was promoted to shift leader at the end of September. Martin Bui testified that he first saw employees playing soccer three to four months "ago."[28] In initial testimony, Martin Bui said he saw three to four employees, sometimes two, "use the cone or they would wrap the thread and make it into a ball. They would kick back and forth or throw back and forth." They also used two cones to make a goal. In later testimony, he said five employees played soccer the first and second times he saw it, and under cross examination, he said he saw sometimes three and sometimes two employees playing soccer, but among the five alleged discriminatees, they all played. Although Martin Bui testified that he did not know the first or second time who was playing, he testified that he had seen Mr. Vong, Mr. Bui, Mr. Trinh, Loi Nguyen, and Phuong Nguyen playing at some time. Martin Bui said he spoke to Phuong Nguyen after the second sighting and told him not to play like that, as it would cause him to be fired. Martin Bui assertedly did not report the matter to management after either the first or second sighting essentially because of loyalty to Mr. Ly. On August 12, at 8:55, according to Martin Bui, he saw Phuong Nguyen knee kick the smaller thread ball toward Mr. Bui and Mr. Vong. Martin Bui told Mr. Vong not to play soccer like that because he would be fired. Phuong Nguyen immediately grabbed the ball and threw it in the trashcan. The incident lasted no longer than a minute.

Anthony Trinh: Anthony Trinh, second shift leader since early August, testified that after he was transferred to the second shift, he saw employees playing soccer four or five times. The first time, he saw Mr. Bui, Loi Nguyen, Mr. Vong, and Mr. Trinh. He told them not to play soccer any more and to return to work, which they did. The next day, Anthony Trinh saw Mr. Trinh,

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[26] Mr. Galan admitted that he testified in Mr. Trinh's unemployment hearing that the soccer playing lasted for up to 20 minutes. He maintained his unemployment testimony was consistent with his hearing testimony, saying, "When I talk about minutes, I am talking about 10, 15, 20 minutes," adding, "On some occasions, when I walked by and I saw them and then, I came back and they were still playing…they would observe me while I was walking by. When I got over to the other side, it was then that they would play."

[27] "As we were about to close" apparently refers to the closing of the second shift.

[28] Martin Bui's testimony would seem to fix his first soccer observation three to four months prior to the hearing, but as the alleged discriminatees had been fired several months before that, his timespan perception is either badly skewed or he meant some other time period. The first time Martin Bui saw any soccer playing was when he worked as a fixer.

Mr. Vong, Phuong Nguyen, and Loi Nguyen kicking two objects back and forth: masking tape wrapped into a round shape like a ball (the tape-ball) and a cone.[29] Again, he told them to go back to work; three complied, but Mr. Trinh just laughed at him. On the last occasion, Anthony Trinh saw Loi Nguyen, Mr. Vong, Mr. Bui, and Mr. Trinh playing soccer and let Ms. Au know.

At the fixer meeting, Mr. Galan asked Martin Bui if had had seen employees playing soccer, and Martin Bui named the three he had seen. Mr. Galan said he had seen five; he named them and asked Martin Bui to write their names. According to Mr. Galan, he told Martin Bui and Anthony Trinh that since the employees continued playing despite earlier warnings, he would have to leave a note for Mr. Orriols.[30]

Mr. Galan wrote a note in Spanish, stating that five employees had been playing soccer in the plant at about 8:45 p.m. on August 12. Mr. Galan had Martin Bui write the names of Frankie Trinh, Tuan Bui, Hung Vong, Loi Nguyen, and "Phuong (Fixer)" on the note, as Mr. Galan did not know all of them. Mr. Galan left the note along with the balls on Mr. Orriols' desk.

The facility was closed the weekend following Friday, August 12 from 6 a.m. on Saturday until Monday, August 15. On Monday, August 15, Mr. Orriols found on his desk the thread balls and the note from Mr. Galan. Mr. Orriols took the thread balls and the note to Ms. Au, who said she would look into the matter. When Mr. Olea came to work, Mr. Orriols showed him the thread balls and Mr. Galan's note and told him that Ms. Au was investigating the situation.

On Tuesday, August 16, Ms. Au reported her findings to Mr. Olea.[31] She told Mr. Olea that Martin Bui, Carlos Galan, and Anthony Trinh had witnessed employees playing soccer, but she was unclear as to specifics, reporting that "maybe one saw two, maybe one saw three, maybe one saw five of them, and maybe they all saw five."

Mr. Olea arranged for Martin Bui, Carlos Galan, and Anthony Trinh to meet with him. During their meeting, according to Mr. Olea, Carlos Galan told Mr. Olea that he had seen the five employees named on the note playing soccer, that the employees set up two cones as goal markers and kicked the larger thread ball trying to score goals, and that Mr. Galan had reported it to Mr. Ly, thinking he would take care of it.[32] According to Mr. Olea, Martin Bui said he had seen the five employees playing soccer and had told Phuong Nguyen to stop but had not reported it to management, as he thought if he did so, Mr. Ly would tell the employees and he would be in trouble.[33] According to Mr. Olea, Anthony Trinh said he had seen employees playing soccer on the second shift following his transfer about two weeks earlier but had not

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[29] Anthony Trinh denied ever seeing employees playing with balls of yarn.

[30] Anthony Trinh did not testify of any discussion with Mr. Galan about soccer playing at the fixer meeting or any other time. He did testify that he told Martin Bui about the soccer playing, "in general" once or twice, which testimony Martin Bui did not corroborate.

[31] This date is based on Mr. Olea's testimony that it "might" have been Tuesday when Ms. Au reported back to him. There is no evidence as to whether she delivered her report before or after Mr. Olea's heated meeting with employees on Tuesday, August 16.

[32] Mr. Galan did not testify as to what he told Mr. Olea.

[33] Martin Bui did not recount specifically what he had told Mr. Olea, saying only that he had told him "everything." He testified that he did not report the soccer playing to management because, essentially, such was Mr. Ly's responsibility and not his. His testimony did not corroborate Mr. Olea's in that regard.

reported it because he wanted to see if he could work it out on his own.[34] After meeting with the three shift leaders, Mr. Olea asked them to document their observations.

Following his meeting with Carlos Galan, Anthony Trinh, and Martin Bui, Mr. Olea asked Mr. Ly about soccer playing on the second shift. By Mr. Olea's account, the inquiry was brief: "I brought [Mr. Ly] into my office and I asked him if he knew of any of this that was going on, the playing of soccer. He denied it. He said no, he'd never seen them play soccer." By Mr. Ly's account, he informed (or reminded) Mr. Olea that he had been transferred earlier from the second to the first shift and told Mr. Olea that he no longer knew what took place on second shift. Mr. Ly told Mr. Olea he had never seen Tuan D. Bui, Loi Tan Nguyen, Phuong Hoang Nguyen, Frankie Trinh, or Hung Vong play soccer at work.

By separate notes, each dated August 17, Carlos Galan, Anthony Trinh, and Martin Bui documented their observations for Mr. Olea. The notes, respectively, read in pertinent part:

> I saw these 5 employees playing soccer inside the plant on 8/12/05 at 8:45 P.M. I saw employees Franki put the ball in the trash. I seen them playing soccer couple time before. Employees: name Loi Nguyen, Tuan Bui, Hung Vanh Vong, Phuong Nguyen, Franki Trinh.
> Lead Carlos Galan
>
> Aug/05/2005
> 1. F. Trinh verbal warning[35]
> 2. Tuan—Bui
> 3. Hung—Vong
> 4. Loi—Nguyen
> Aug/08/2005
> 1. Tuan—Bui verbal warning
> 2. Loi—Nguyen
> 3. Phuong
> Aug/12/2005
> 1. Tuan—Bui
> 2. Hung—Vong
> 3. Phuong
> Leadperson: Anthony Trinh[36]
>
> From: Martin Bui
> On 8/12/05 at 8:55 PM, I saw 3 operators played soccer. They were Phuong Nguyen (Fixer), Tuan Bui, Hung Vanh Vong. I said, "Phong! Stop this game because not right to play…" After that I saw him put the ball into the trash. Many times before, I seen 5 operators play soccer inside the plant. They were 1/

[34] Anthony Trinh testified he told Mr. Olea he had seen employees kicking the tape-ball and a cone by itself.

[35] Mr. Olea instructed Anthony Trinh to note "verbal warning" to signify when he had orally warned the named individuals about playing soccer.

[36] Anthony Trinh explained that although he witnessed four to five soccer incidents, he only noted three on his memo to Mr. Olea because the others occurred after August 12. I cannot accept his testimony. Given the seriousness of the alleged misconduct, which resulted in the discharge of six employees, it is inconceivable that Anthony Trinh observed soccer playing after August 12 but failed to report it. I discount his testimony entirely in this regard.

Phuong Nguyen, 2/ Tuan Bui, 3/ Hung Vanh Vong, 4/ Loi Nguyen, 5/ Franki Trinh. I had verbal warning twice times with Phuong Nguyen. First time I don't remember the date and second time on 8/12/05.

After receiving the notes, Mr. Olea consulted Respondent's safety specialist, Mr. Kahn, explaining that witnesses had seen five employees kicking a yarn ball in the middle of the aisle where they had set up thread cones. Mr. Kahn reminded Mr. Olea that Respondent had a zero tolerance policy for such conduct and agreed with Mr. Olea that the five should be terminated. Mr. Olea then discussed the matter with Ms. Au and Mr. Orriols, both of whom agreed the employees should be terminated.

On August 18 while at work, Mr. Bui, Loi Nguyen, Phuong Nguyen, Mr. Trinh, and Mr. Vong were directed to go to the company training room. As the other employees waited in the training room, each was called separately into Mr. Olea's office where Mr. Olea, Mr. Orriols, and Ms. Au were present. Each employee interview followed essentially the same pattern: Mr. Olea showed each employee the thread balls and asked each employee if he had played soccer with them while working. After each employee denied having done so, Mr. Olea told the employee he was fired, presented him with his final check, and had him escorted from the facility.

Mr. Bui, Loi Nguyen, Phuong Nguyen, Mr. Trinh, and Mr. Vong each denied ever playing soccer or any game with balls of string/ thread while at work, although Phuong Nguyen admitted to pushing aside the thread that accumulated on the floor, as did all employees, to avoid slipping. Mr. Bui, Loi Nguyen, Phuong Nguyen, and Mr. Vong denied having been admonished or warned about any such activity. Mr. Trinh admitted that one evening shortly before his discharge, while he was working, Mr. Galan told him not to play soccer or "not to kick the ball," which Mr. Trinh denied having done. Phuong Nguyen and Mr. Bui, each asked to confront his accuser(s) during his termination interview, which request Mr. Olea refused.

After considering all testimony regarding employee soccer playing at work, I find the denials of Mr. Bui, Loi Nguyen, Phuong Nguyen, Mr. Trinh, and Mr. Vong more credible than the accusations of Mr. Galan, Martin Bui, and Anthony Trinh. Ms. Au initially interviewed the three to ascertain the basis for Mr. Galan's note to Mr. Orriols. Presumably, Ms. Au was disposed to give credence to their versions. After speaking with the three, however, she was unable to report clearly who had seen which employees playing soccer.[37] Ms. Au's report to Mr. Olea that "maybe one [of the shift leaders] saw two, maybe one saw three, maybe one saw five of them, and maybe they all saw five" justifies an inference that the three shift leaders' accounts, given soon after the alleged soccer playing, were ambiguous if not contradictory. At the hearing, the three shift leaders' testimony of what they had seen continued to be unclear and inconsistent. Mr. Galan reported seeing the five alleged discriminatees playing soccer with a ball of yarn on August 12, using cones set up on either side for goals, but Martin Bui saw only three, and Anthony Trinh saw four, although both they and Mr. Galan saw the soccer playing at essentially the same time.[38] Moreover, Mr. Galan apparently reported an extended period of soccer playing while Martin Bui said it lasted no more than a minute. Further, although Mr. Galan and Martin Bui reported seeing Mr. Trinh put the yarn ball into the trash, Anthony Trinh insisted he saw a masking-tape ball not a yarn ball being used. Unlike Mr. Galan, neither Martin Bui nor

[37] The imprecision of the three shift leaders as to what they had seen cannot be attributed to a language barrier. Presumably, Ms. Au spoke to two of them in their native languages.

[38] As a clear indication that the sightings occurred at the same time, both Mr. Galan and Martin Bui reported seeing Mr. Trinh put the yarn ball into the trash.

Anthony Trinh described cone goals. The written reports of the three witnesses regarding the August 12 soccer playing were equally inconsistent. Mr. Galan reported seeing all five playing soccer but said nothing about cone goals, while Martin Bui and Anthony Trinh reported seeing three employees playing soccer, not the five Mr. Galan reported. I find, therefore, that Mr. Bui, Loi Nguyen, Phuong Nguyen, Mr. Trinh, and Mr. Vong did not engage in horseplay at work to the degree or the frequency described by Mr. Galan, Martin Bui, and Anthony Trinh.[39]

Following his discharge, the California Unemployment Insurance Appeals Board held a hearing regarding Mr. Trinh's claim for unemployment benefits.[40] In Respondent's March 6, 2006 appeal from the Appeals Board's grant of benefits to Mr. Trinh, Mr. Olea described the yarn-ball soccer playing as a full-blown soccer game:

> There was a goalie tending a goal where two spools of yarn were used as goal poles. The goalie defended the goal by trying to stop the ball from crossing the imaginary line by diving for the ball or kick[ing] the ball with his feet. The opposing player was moving the ball with his feet trying to fake one way and going the other way to kick the ball of yarn between the two spools of yarn. The other players would rotate in when a player would not score.[41]

3. August 18 Discharge of Kiet Tuan Ly

On August 18, Mr. Ly was again called to Mr. Olea's office. With Ms. Au translating, Mr. Olea told Mr. Ly that because he had permitted employees to kick balls while he was the second-shift lead, he was fired. Mr. Olea presented Mr. Ly with a termination notice, which, in pertinent part read:

> Termination due to failure to perform his duties as a lead person to enforce the company rules; allowing the employees to play soccer in the plant; and allowing it to occur and continue on various occasions.

In spite of Mr. Galan, Martin Bui, and Anthony Trinh having, reportedly, seen employees play soccer during work over the course of several weeks, none was disciplined in any way for having permitted the horseplay. Indeed, there is no evidence that Mr. Olea or Mr. Orriols thereafter conducted any counseling or training with the three shift leaders concerning workplace misconduct or reporting procedures.

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[39] I recognize that Mr. Bui, Mr. Loi Nguyen, Mr. Phuong Nguyen, Mr. Trinh, and Mr. Vong's denials are not wholly free from equivocation. While three of the employees implausibly denied ever having so much as touched foot to yarn debris, Phuong Nguyen admitted pushing aside accumulated thread with his feet to avoid slipping, and Mr. Trinh acknowledged he had been warned, albeit unjustifiedly, not to play soccer. Nonetheless, as between accuser and accused, I find the testimony of the latter group, for the reasons stated above, to be the more trustworthy.

[40] Unemployment hearings for other of the alleged discriminatees were held on December 1.

[41] Mr. Olea admitted that none of the documentation supplied by Mr. Galan, Martin Bui, or Anthony Trinh supported the version of soccer playing he reported to the California Unemployment Insurance Board; he did not explain the discrepancy.

V. Discussion

A. Supervisory/Agency Status of Kiet Tuan Ly

Respondent contends that Mr. Ly was, at all relevant times, a supervisor within the meaning of Section 2(11) of the Act. Respondent carries the burden of proving supervisory status. *Kentucky River Community Care, Inc.,* 121 S. Ct. 1861, 1866-1867 (2001); *Dean & Deluca New York, Inc.,* 338 NLRB 1046, 1047 (2003) ("The party asserting [supervisory] status must establish it by a preponderance of the evidence [citations omitted]"). Thus, Respondent must establish that Mr. Ly had the authority to exercise at least one of the powers enumerated in Section 2(11) of the Act and that the use of that authority involved a degree of discretion that rises to the level of "supervisory independent judgment." *Dean & Deluca New York, Inc.*, supra, at 1247, citing *Elmhurst Extended Care Facilities,* 329 NLRB 535, 536 fn. 8 (1999). As the Supreme Court noted, "The statutory term 'independent judgment' is ambiguous with respect to the *degree* of discretion required for supervisory status...It falls clearly within the Board's discretion to determine, within reason, what scope of discretion qualifies."[42] The Board is careful not to give too broad an interpretation to the statutory term "independent judgment" because supervisory status results in the exclusion of the individual from the protections of the Act. *Tree-Free Fiber Co.,* 328 NLRB 389 (1999); *McGraw-Hill Broadcasting Co., Inc.,* 329 NLRB 454, 459 (1999). Further, the Board construes any lack of specific evidence to support a finding of supervisory status against the party asserting supervisory status and conclusionary evidence is insufficient to establish supervisory status. *Armstrong Machine Company, Inc.,* 343 NLRB No. 122, fn. 4 (2004) and cases cited therein; *Dean & Deluca New York, Inc.*, supra, at 1247.

Section 2(11) of the Act defines a "supervisor" as any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. "The possession of even one of those attributes is enough to convey supervisory status, provided the authority is exercised with independent judgment, not in a merely routine or clerical manner." *Arlington Electric, Inc.,* 332 NLRB 74 (2000), quoting *Union Square Theatre Management,* 326 NLRB 70, 71 (1998). The authority effectively to recommend "generally means that the recommended action is taken with no independent investigation by superiors, not simply that the recommendation is ultimately followed." *ITT Lighting Fixtures,* 265 NLRB 1480, 1481 (1982).

Of those powers enumerated in section 2(11) of the Act, Respondent contends Mr. Ly possessed authority responsibly to assign work to, to discipline, to responsibly direct, or effectively to recommend such actions with regard to knitting department machine operators. This inquiry must focus not only on whether Mr. Ly possessed such authority but whether he exercised it with independent judgment and not in a merely routine or clerical manner, as such is the crucial question in deciding supervisory status.

Regarding authority to discipline employees, the evidence establishes that Mr. Ly was expected to report to management such employee infractions as area cleanliness and safety violations and that, along with admitted supervisors, he signed documented disciplinary actions. Respondent provided no examples of Mr. Ly's having imposed or initiated discipline for any employees whose work he oversaw, and the evidence revealed that Mr. Ly was not consulted before discipline was imposed. If a disciplinary issue arose, Mr. Ly was expected to note the

[42] *NLRB v. Kentucky River Community Care*, supra at 1867-1868 (2001).

problem for Mr. Orriols' consideration, although in unusual situations, Mr. Ly could send an employee home and review the matter with Mr. Orriols the next day. Mr. Ly's role in Respondent's disciplinary process appears to be no more than the misconduct reportorial function that a leadperson might possess without incurring supervisory status. See *Los Angeles Water and Power Employees' Association,* 340 NLRB 1232, 1234 (2003) (individual's report of misconduct does not constitute effective recommendation of discipline where management undertakes its own investigation and decides what, if any, discipline to impose); *Ryder Truck Rental, Inc.,* 326 NLRB 1386 (1998) (authority to issue verbal or written warnings that do not affect employee status or to recommend discipline do not evidence disciplinary authority); *Millard Refrigerated Services, Inc.,* 326 NLRB 1437, 1438 (1998) (employees did not effectively recommend discipline when they submitted disciplinary forms to the plant superintendent who approved them only after conducting an independent investigation; the employees exercised nothing more than a reportorial function that was typical of a "leadman" position). Evidence was also adduced that Mr. Ly had the authority to send employees home in unusual situations, after which Mr. Ly was to review the situation with upper management. The authority to send employees home for engaging in misconduct is typically considered evidence of supervisory authority. *Bredero Shaw, A Division Of Shawcor Ltd.*, 345 NLRB No. 48, slip op. 2 (2005). However, if such authority is limited to instances of egregious misconduct, the Board does not consider the authority meets statutory supervisory indicia. *Bredero Shaw, A Division Of Shawcor Ltd.*, supra, citing *Vencor Hospital-Los Angeles,* 328 NLRB 1136, 1139 (1999) and *Washington Nursing Home,* 321 NLRB 366 fn. 4 (1996). Here, the evidence is insufficient to determine whether Mr. Ly's authority to send misbehaving employees home fits within the rule or within the exception. No evidence was adduced that Mr. Ly ever sent any employee home for misconduct, and no testimony clarified whether or not such a decision, if made, would turn on the egregiousness of the misconduct. Absent a showing that an individual's authority was ever exercised or that it was exercised in connection with a disciplinary matter resulting in a loss of pay, the Board has declined to find supervisory status. See *Bredero Shaw, A Division Of Shawcor Ltd.*, supra, citing *Azusa Ranch Market,* 321 NLRB 811 (1996). Since the Board construes any lack of specific evidence to support a finding of supervisory status against the party asserting supervisory status,[43] I cannot find that Mr. Ly's asserted authority to send recalcitrant employees home establishes his supervisory status.

In urging that Mr. Ly be found a supervisor, Respondent relies most heavily on Mr. Ly's alleged responsibility to assign work to and responsibly to direct knitting department machine operators. There is no question that Mr. Ly oversaw the knitting work of and made daily machine assignments to the machine operators on his shift. Those facts alone do not establish that Mr. Ly exercised supervisory authority. Respondent must show that Mr. Ly's oversight and work assignments required independent judgment. *Dean & Deluca New York, Inc.,* supra at fn. 13. The evidence shows that Mr. Orriols provided extensive, ongoing training to shift leaders as to their machine assignment duties, instructing them how to work with employees, how to find out which machines employees were comfortable with, and how to assign machines. Work assignments so circumscribed by managerial oversight do not signify independent judgment. See *Dynamic Science, Inc.,* 334 NRLB 391 (2001) (no supervisory status where crew leader's authority was "extremely limited and circumscribed by detailed orders and regulations issued by the Employer.") Moreover, employee assignment complaints resulted in direct management intervention, i.e., discussion among the employee, the shift leader, and Mr. Orriols. In these

[43] Armstrong Machine Company, Inc., supra fn. 4; Dean & Deluca New York, Inc., supra, at 1247.

circumstances, it is impossible to conclude that Mr. Ly's work assignments involved significant discretion or independent judgment; rather it appears that they simply entailed implementation of detailed and specific managerial guidelines.

As to overseeing machine operators' work, there is no evidence Mr. Ly independently devised work plans or did other than follow the routines and requirements prescribed by Respondent. Mr. Ly's direction of employees in their performance of routine work does not demonstrate independent judgment. *Armstrong Machine Company, Inc.,* supra; *Central Plumbing Specialties, Inc.,* 337 NLRB 973 (2002); See also *Hexacomb Corp.,* 313 NLRB 983, 984 (1994). The evidence regarding Mr. Ly's overseeing the machine operators' work is devoid of specific instances of control, which would give a clearer picture of his authority. Conclusionary evidence that an individual possesses employee oversight authority, does not, without more specificity, establish the individual as a statutory supervisor. See, for example: *Los Angeles Water and Power Employees' Association,* supra at slip op. 4 (assertion of authority to grant or deny time off fails in absence of specific instances of exercise of authority); *Dean & Deluca New York, Inc.,* supra at fn. 15, citing *Jordan Marsh Stores Corp*., supra (individual's direction and scheduling of employees does not necessarily establish that the individual is a statutory supervisor). Any lack of specific evidence to support a finding of supervisory status is construed against the party asserting supervisory status*. Armstrong Machine Company, Inc.*, supra at fn. 4; *Dean & Deluca New York, Inc.,* supra at 1048. The Board has said that "general, conclusionary evidence, without specific evidence [that an employee] in fact exercises independent judgment… does not establish supervisory authority. *Tree-Free Fiber Co.,* supra at 393. In the absence of evidence that Mr. Ly's authority as to discipline, work assignment, or work oversight involved independent judgment, I cannot find his authority conferred supervisory status. See *Billows Electric Supply of Northfield, Inc.,* 311 NLRB 878 (1993).

B. Alleged Independent 8(a)(1) Violations

1. The July 20 Meeting with Employees

The General Counsel alleged that in his remarks to assembled employees on July 20, Gus Flores, acting as an agent of Respondent, threatened employees with plant closure and job loss if employees chose the Union as their representative. In support of the allegations, Counsel for the General Counsel offered the testimony of five alleged discriminatees as to what Gus Flores said. Though somewhat vague and sometimes inconsistent, all witnesses testified essentially that Gus Flores described potential consequences of union representation as including stymied bargaining and strikes with resultant plant closure and/or job loss, drawing on recent, widespread grocery store strikes as illustrative examples. There is no evidence that Gus Flores suggested Respondent would take action on its own initiative or that the potential consequences would be unrelated to economic necessities or in any way retaliatory. There is no evidence that Gus Flores implied Respondent did not intend to abide by the law or negotiate in good faith should employees select the Union as their representative. In these circumstances, statements made during the July 20 meeting did not violate Section 8(a)(1). See *Stanadyne Automotive Corp.,* 345 NLRB No. 6, slip op. 8-10 (2005). Accordingly, I shall dismiss this allegation of the complaint.

2. Interrogation, Surveillance, and Coercion

In July or August, Ms. Au told Martin Bui and Mr. Ly that if the Union came into the company, Respondent would close the business and move to Mexico where it already had a facility. Ms. Au's statement was a direct threat of plant closure, unrelated to economic

necessities or objective factors and violated Section 8(a)(1) of the Act. See *NLRB v. Gissel Packing Co., Inc.*, 395 U.S. 575, 618, 71 LRRM 2481, 2497 (1969).

In early August, Ms. Au asked Mr. Vong if he had signed a union card. Her question constitutes unlawful interrogation and violates Section 8(a)(1) of the Act.

On August 8, in the hearing of several employees, Mr. Kahn cursed at union representative Mr. Bell as he handbilled at the facility and asked what the union would tell employees when the company had to leave. The obvious inference to be drawn from Mr. Kahn's question was that a successful union campaign would result in closure or at least relocation of Respondent. The question coercively interfered with listening employees' Section 7 rights and violated Section 8(a)(1) of the Act.[44]

On August 24, Respondent's security guard, Mr. Leonor, acting as agent of Respondent, unwarrantedly inspected the identification badges of employees who, while on break, attempted to talk to alleged discriminatees who were handbilling with the Union at the facility. Mr. Leonor went beyond ordinary or casual observation of employees' open union activity when he checked identification badges, and Respondent has proffered no justification for his conduct. While Respondent is not required to close its eyes when union activity is publicly and openly conducted, it may not enhance identification of participants by extraordinary means. See *Fairfax Hospital*, 310 NLRB 299, 310 (1993). It is reasonable to infer that Mr. Leonor's conduct must have signaled to employees that their interest in talking to or receiving literature from the handbillers was under company surveillance and must have had the tendency unreasonably to chill the exercise of their section 7 rights.

C. Alleged 8(a)(3) Conduct

1. August 18 Discharges of Tuan D. Bui, Loi Tan Nguyen, Phuong Hoang Nguyen, Frankie Trinh, and Hung Vong

The question of whether Respondent violated Section 8(a)(3) in terminating Mr. Bui, Loi Nguyen, Phuong Nguyen, Mr. Trinh, and Mr. Vong rests on its motivation. The Board established an analytical framework for deciding cases turning on employer motivation in *Wright Line,* 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). To prove an employee was discharged in violation of Section 8(a)(3), the General Counsel must first persuade, by a preponderance of the evidence, that an employee's protected conduct was a motivating factor in the employer's decision. If the General Counsel makes such a showing, the burden of persuasion shifts to the employer "to demonstrate that the same action would have taken place even in the absence of the protected conduct." *Wright Line*, supra at 1089. The burden shifts only if the General Counsel establishes that protected conduct was a "substantial or motivating factor in the employer's decision." *Budrovich Contracting Co.,* 331 NLRB 1333 (2000). Put another way, "the General Counsel must establish that the employees'

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[44] The General Counsel did not specifically allege Mr. Kahn's question as a violation of the Act. However, as the issue has been fully and fairly litigated and is closely connected to the subject matter of the complaint, an 8(a)(1) finding is appropriate. *Gallup, Inc.*, 334 NLRB 366 (2001), citing *Pergament United Sales,* 296 NLRB 333, 334 (1989) enf. 920 F.2d 130 (2d Cir. 1990) ("Board may find and remedy an unfair labor practice not specifically alleged in the complaint if issue is closely connected to the subject matter of the complaint and has been fully litigated.") See also *Letter Carriers Local 3825* 333 NLRB 343, fn 3 (2001); *Parts Depot* 332 NLRB 733, fn 5 (2000).

protected conduct was, *in fact,* a motivating factor in the [employer's] decision." *Webco Industries,* 334 NLRB 608, fn. 3 (2001).

The elements of discriminatory motivation are union activity, employer knowledge, and employer animus. *Farmer Bros. Co.,* 303 NLRB 638, 649 (1991). Here, these elements are clearly met. First, the General Counsel demonstrated that the five alleged discriminatees engaged in union activity by disseminating flyers among coworkers and encouraging them to support the Union. Moreover, in the course of Mr. Olea's August 16 employee meeting, Mr. Vong, Phuong Nguyen, Loi Nguyen, Mr. Bui, and Mr. Trinh conspicuously signified their support of the Union. The Union's August 12 handbill listed employee grievances against the company, including suspensions for missing work and absence of raises. After Mr. Olea denounced the handbill as union "lies," he called for employees to rally to Respondent's defense by telling the Union that Respondent cared about its employees. In response, Mr. Trinh demanded to know why he had not received a raise, and Mr. Vong, supported by the other alleged discriminatees, pressed for an immediate explanation of a recent suspension. The employees' protests volubly demonstrated their concurrence with, if not authorship of, the Union's condemnations and must speedily have disabused Mr. Olea of any notion that they could be counted on to champion Respondent's cause in the union campaign. The employees' conduct amounted to an open espousal of at least two of the handbill's accusations and constituted union activity.[45]

Second, the General Counsel has proved knowledge. Even without their August 16 demonstration of union support, Respondent knew of the alleged discriminatees' union activities through Mr. Olea, Ms. Au, Mr. Orriols, and Mr. Doroteo who had observed the employees actively disseminating union handbills. Had Mr. Olea been in any doubt of their union sympathies, it must have ended when five of them tenaciously pressed employee/union concerns during the August 16 employee meeting.

Third, the General Counsel has presented convincing evidence of Respondent's antiunion animus. Carlos and Gus Flores' dissuasive union discussions with employees, although lawful, show Respondent's keen desire to remain nonunion. Ms. Au's threat to Mr. Ly and Martin Bui that Respondent would close its business if the Union came in, her interrogation of Mr. Vong, and Mr. Ankh's threat of plant closure in the hearing of employees also demonstrated animus. Finally, Mr. Olea revealed specific animus toward the union activity of Mr. Vong, Phuong Nguyen, Loi Nguyen, Mr. Bui, and Mr. Trinh by his angry response to their protest at the August 16 meeting as well as by his August 18 memo to Mr. Trinh's file to the effect that Mr. Trinh was inciting employees during that meeting and trying to get them to revolt.

These circumstances support an inference that animus toward the protected activities of Mr. Vong, Phuong Nguyen, Loi Nguyen, Mr. Bui, and Mr. Trinh were motivating factors in Respondent's decision to discharge them. *Wright Line,* supra at 1089. Accordingly, I find the General Counsel has met his initial burden. Such a finding does not mean that the discharges were in fact "unlawfully motivated." *Id.* As the Board has noted, "The existence of protected activity, employer knowledge of the same, and animus…may not, standing alone, provide the causal nexus sufficient to conclude that the protected activity was a motivating factor for the adverse employment action." *Shearer's Foods, Inc.,* 340 NLRB 1093, fn. 4 (2003); see also *American Gardens Management Company,* 338 NLRB 644, 645 (2002). The General Counsel's establishment of the *Wright Line* factors does, however, shift the burden to

[45] It is unnecessary to determine whether the employees' conduct also constituted concerted protected activity under 8(a)(1) of the Act

Respondent to establish persuasively by a preponderance[46] of the evidence that it would have (not just could have) discharged Mr. Vong, Phuong Nguyen, Loi Nguyen, Mr. Bui, and Mr. Trinh even in the absence of their union activity. *Desert Toyota,* 346 NLRB No. 3, slip op. 2-3 (2005); *Webco Industries,* 334 NLRB 608, fn. 3 (2001); *Avondale Industries, Inc.,* 329 NLRB 1064,1066 (1999); *T&J Trucking Co.,* 316 NLRB 771 (1995).

Respondent argues that Mr. Vong, Phuong Nguyen, Loi Nguyen, Mr. Bui, and Mr. Trinh were discharged not for their protected activities but because they played soccer during work time, a clear safety hazard warranting discharge. I have discounted the testimony of Mr. Galan, Martin Bui, and Anthony Trinh regarding employee soccer playing, but my conclusion that the five alleged discriminatees did not engage in the claimed misconduct does not resolve the issue. While Mr. Galan, Martin Bui, and Anthony Trinh may have exaggerated insignificant actions into soccer playing or wholly manufactured the alleged incidents, there is no question they reported misconduct to Mr. Olea. There is no evidence that Mr. Galan, Martin Bui, or Anthony Trinh were supervisors within the meaning of Section 2(11) of the Act at the time of their reports or that Respondent prompted them to embellish or invent their accounts. An employer is not accountable under the Act for the inaccurate accusations, innocent or malicious, of nonsupervisory employees. In circumstances where Respondent has obtained evidence of misconduct, Respondent need not prove that the accused employees committed the alleged offenses. "Absent a showing of anti-union motivation, an employer may discharge an employee for a good reason, a bad reason, or no reason at all without running afoul of the labor laws." *Neptco, Inc.,* 346 NLRB No. 6, slip op 2 (2005).[47] However, Respondent "must show that it had a reasonable belief that the employee[s] committed the offense, and that it acted on that belief when it discharged [them]." *McKesson Drug Co.,* 337 NLRB 935, 936 fn. 7 (2002); see also *Midnight Rose Hotel & Casino, Inc.,* 343 NRB No. 107, slip op. 3 (2004) (employer must establish, at a minimum, that it had reasonable belief of employee misconduct); *Yuker Construction,* 335 NLRB 1072 (2001) (discharge based on mistaken belief does not constitute unfair labor practice, as employer may discharge an employee for any reason, whether or not it is just, so long as it is not for protected activity); *GHR Energy,* 249 NLRB 1011, 1012-1013 (1989) (demonstrating reasonable, good-faith belief that employees had engaged in misconduct sufficient). The focus of the instant inquiry, therefore, must be on Respondent's motivation in discharging the five alleged discriminatees after Mr. Olea received reports of their misconduct. The question is whether Respondent believed in good faith that the employees had engaged in serious misconduct, or whether Respondent seized upon Mr. Galan, Martin Bui, and Anthony Trinh's reports to rid itself of union activists.

In assessing Mr. Respondent's motivation in discharging Mr. Vong, Phuong Nguyen, Loi Nguyen, Mr. Bui, and Mr. Trinh, I have considered the following pertinent timetable:

Friday, August 12 -- The Union passed out flyers quoting employees critical of Respondent. Mr. Galan, Martin Bui, and Anthony Trinh assertedly saw the five alleged discriminatees playing soccer when they should have been working. Mr. Galan left a note for Mr. Orriols to that effect.

[46] A "preponderance" of evidence means that the proffered evidence must be sufficient to permit the conclusion that the proposed finding is more probable than not. McCormick Evidence, at 676-677 (1st ed. 1954).

[47] Citing *Midwest Regional Joint Board v. NLRB,* 564 F.2d 434 (D.C. Cir. 1977).

Monday, August 15	-- Mr. Orriols showed the note to Ms. Au who said she would look into the matter. Later, on this or the next day, Mr. Orriols gave Mr. Galan's note to Mr. Olea, along with the information that Ms. Au was looking into the matter. Later that day or the next, Ms. Au reported to Mr. Olea that she had talked to Mr. Galan, Martin Bui, and Anthony Trinh. She was unclear as to who had seen which employees playing soccer.
Tuesday, August 16	-- Respondent held a meeting of employees in which Mr. Olea denounced the Union's August 12 criticisms, two of which concerned lack of raises and suspensions for missed work. At the meeting Mr. Trinh protested not getting a raise, and Mr. Vong demanded that Mr. Olea explain a past suspension, which demand the four other alleged discriminatees supported.
Wednesday, August 17	-- Mr. Galan, Martin Bui, and Anthony Trinh gave Mr. Olea signed statements regarding their soccer observations. Mr. Olea consulted Mr. Kahn as to whether playing soccer at work warranted discharge and made the final decision to terminate the five employees.
Thursday, August 18	-- Mr. Olea discharged the five alleged discriminatees and placed in Mr. Trinh's file a memo describing Mr. Trinh's conduct in the August 16 meeting as "inciting the group, trying to get the group to revolt."

Timing is a significant factor in ascertaining motive. See, e.g. *LB&B Associates, Inc.,* 346 NLRB No. 92 slip op. 2 (2005); *Desert Toyota,* supra, slip op. 3; *Detroit Paneling Systems,* 330 NLRB 1170 (2000). Here, Mr. Olea decided to discharge the five alleged discriminatees the day after his contentious interaction with them at the August 16 meeting, and he discharged them on the day he described the conduct of one of them as inciting group revolt. Thus the timing links the employees' protected expressions of dissatisfaction to their discharges. Along with timing, the wording of Mr. Olea's memo to Mr. Trinh's file illuminates Respondent's motive. Mr. Trinh's "unacceptable" incitement to revolt could only have related to Mr. Olea's appeal to rebuff the Union and stand up for Respondent and exposes a deep-seated animosity toward the employees' refusal to endorse company labor practices.

Evidence of a discriminatory motive does not, however, end the inquiry. The fact that Respondent may have welcomed the opportunity to discharge union supporters does not vitiate its defense if Respondent genuinely believed the five alleged discriminatees engaged in misconduct that would (not just could) result in discharge. See *Ironwood Plastics, Inc.,* 345 NLRB No. 105 (2005). Respondent's investigation and discharge process must be closely examined to resolve the question. In his investigation of the alleged soccer playing, Mr. Olea considered the accounts of Mr. Galan, Martin Bui, and Anthony Trinh in three stages: Ms. Au's report of what they had to say, his own group interview of them, and their post-interview written statements. Based on all the evidence adduced at the hearing, it is apparent that at no stage of the investigation were the three witnesses clear and consistent in their accounts. After Ms. Au spoke to the three witnesses, her report to Mr. Olea of what they had seen was ambiguous. She could not say clearly who had seen which employees playing soccer. Mr. Olea's interview of the three witnesses also failed to produce clear, consistent accounts of what they had purportedly seen. Mr. Galan reported seeing the five alleged discriminatees playing soccer with a ball of yarn on August 12, using cones set up on either side for a goal. Martin Bui saw only

three, and Anthony Trinh saw only four, although both they and Mr. Galan saw the soccer playing at roughly the same time.[48] Moreover, Anthony Trinh reportedly saw a masking-tape ball not a yarn ball being used, and neither Martin Bui nor Anthony Trinh described cone goals. Further, Mr. Galan apparently reported an extended period of soccer playing while Martin Bui said it lasted no more than a minute. The written reports of the three witnesses regarding the August 12 soccer playing were equally inconsistent. Mr. Galan reported seeing all five playing soccer but omitted any mention of cone goals. Martin Bui reported seeing not five but three employees playing soccer, as did Anthony Trinh.

An employer's reasonable belief of misconduct may justify adverse employment action. *McKesson Drug Co.,* 337 NLRB 935, 936 (2002), but I cannot find that Respondent held a reasonable belief that the five alleged discriminatees engaged in misconduct. Any reasonable and objective review of the investigation must have exposed its significant inconsistencies. Those inconsistencies would surely suggest to a sensible administrator, which I have no doubt Mr. Olea is, that it might be prudent to inquire further. A reasonable and good-faith investigation might, for example, have included asking the allegedly involved employees, or their coworkers, for information. A reasonable and good-faith investigation ought to have factored in Mr. Ly's denial of seeing any soccer playing while he was second shift leader, the discounting of which Mr. Olea failed to explain. There is no evidence of exigent circumstances requiring immediate action against the five employees and no explanation as to why the discharges were so quickly effected. Respondent's rush to penalty and its reliance on flawed investigatory findings evidence an improper motive and seriously undercut Respondent's defense. See *Midnight Rose Hotel*, supra at slip op. 3 (failure to conduct fair investigation before imposing discipline defeats claim of reasonable belief of misconduct).

It may be, of course, that Mr. Olea, who had to have been aware of the investigatory deficiencies, resolved them in favor of discharge for legitimate reasons. Mr. Olea did not, however, share those reasons at the hearing, and no evidence manifests them. Moreover, in his March 6, 2006 appeal from the California Unemployment Insurance Appeals Board grant of unemployment benefits to Mr. Trinh, Mr. Olea inflated the alleged employee misconduct to a full-blown soccer game, which none of the misconduct reports corroborated. Mr. Olea's exaggerated and unsupported post-discharge description of what occurred further undercuts Respondent's defense, as it is reasonable to expect that if Mr. Olea were confident of his original assessment of misconduct he would not have felt compelled to embellish it. After considering all the factors detailed above, I find Respondent's evidence insufficient to prove its good faith belief in the five alleged discriminatees' misconduct at the time Mr. Olea discharged them. If, as I have found, Respondent held no good faith belief of the employees' misconduct, then the only motivation left is its animosity toward their union activities.

Respondent argues that absence of adverse action against other outspoken union adherents such as Dung Nguyen proves the legitimacy of the discharges. The Board has consistently held, however, that failure to retaliate against all union supporters does not preclude a finding of unlawful motivation as to the discharge of others. *Volair Contractors, Inc.,* 341 NLRB No. 98, fn. 17 (2004). Accordingly, I find Respondent has not met its shifted burden of proving that it would have discharged the employees even in the absence of their protected concerted activities, and I find that Respondent violated Sections 8(a)(3) and (1) of the Act by discharging Mr. Vong, Phuong Nguyen, Loi Nguyen, Mr. Bui, and Mr. Trinh on August 18.

[48] I.e., both Mr. Galan and Martin Bui reported seeing Mr. Trinh put the yarn ball into the trash.

2. Early August Transfer of Kiet Tuan Ly

The General Counsel alleges that in early August Respondent transferred Mr. Ly from the second shift to the first shift because of his union activities and in order to discourage employees from engaging in union activities. As explained earlier, I have found that Respondent transferred Mr. Ly in hopes of improving first shift production and informed Mr. Ly of that purpose. Under the Board's Wright Line analysis, the General Counsel must prove that an adverse employment action occurred. Certain employment actions, i.e. those involving discipline or unfavorably altering terms and conditions of employment, are clearly adverse. The General Counsel has not, however, shown how Mr. Ly's transfer from second to first shift adversely affected him. The General Counsel adduced no evidence that Mr. Ly's post-transfer duties changed, that his prospects for benefits or continued employment were diminished, or that his job was any less convenient or pleasant. Indeed the evidence shows that Mr. Ly cheerfully agreed to the transfer and was thereafter happy in his work.

Counsel for the General Counsel argues that Respondent transferred Mr. Ly in order to separate him from other second shift union supporters, and the circumstances create at least a suspicion that Respondent was so motivated. However, even assuming the suspicion to be well-founded and Respondent's motivation discriminatory, the General Counsel must still show the transfer constituted an adverse employment action, which the General Counsel has not done. Therefore, I conclude that the General Counsel failed to establish a necessary element of *Wright Line,* i.e. that an adverse employment action occurred when Respondent transferred Mr. Ly. Consequently, I find the General Counsel failed to meet his 8(a)(3) burden of proof. Accordingly, I shall dismiss this allegation of the complaint.

3. August 18 Discharge of Kiet Tuan Ly

After Mr. Ly's transfer to the first shift, Respondent discharged him on August 18, which action the General Counsel alleges violated Section 8(a)(3) of the Act. To substantiate the allegation, the General Counsel must prove the requisite elements of union activity, employer knowledge, and employer animus.[49] As to knowledge specifically related to Mr. Ly's union activities, the General Counsel presented evidence that on July 15 Mr. Dorotea observed Mr. Ly distribute union flyers inside the plant with head-shaking disapproval. On another occasion, Mr. Olea observed Mr. Ly with a flyer. The General Counsel has thus met its burden of proving Mr. Ly's union activity and Respondent's knowledge of it. As to Respondent's alleged animus, as noted above I have found that Respondent committed various violations of 8(a)(1) and discriminatorily discharged Mr. Bui, Loi Nguyen, Phuong Nguyen, Mr. Trinh, and Mr. Vong for engaging in union activity, all of which evidence strong animus. The General Counsel has therefore adduced evidence sufficient to support an inference that Mr. Ly's union activity was a substantial or motivating factor in Respondent's decision to terminate him and has met his initial *Wright Line* burden. The burden of persuasion thus shifts to Respondent to "demonstrate that the same action would have taken place even in the absence of the protected conduct." *Wright Line*, supra at 1089.

Respondent maintains that it would have discharged Mr. Ly regardless of his union activity because he failed to prevent Mr. Bui, Loi Nguyen, Phuong Nguyen, Mr. Trinh, and Mr. Vong from playing soccer during work time, essentially arguing that he condoned the alleged misconduct. Since I have already found that Respondent did not discharge Mr. Bui, Loi Nguyen, Phuong Nguyen, Mr. Trinh, and Mr. Vong for playing soccer at work but because of

[49] *Wright Line,* supra.

their protected activities, it follows that Respondent could not, in good faith, have discharged Mr. Ly for failing to prevent the claimed activity. Additional considerations further vitiate Respondent's defense: (1) Mr. Ly had not been the shift leader for some time prior to the August 12 soccer playing that assertedly prompted the discharges and, therefore, could not reasonably be held accountable for post-transfer soccer playing; (2) shift leaders Mr. Galan, Martin Bui, and Anthony Trinh had also, according to Respondent's evidence, failed to curtail soccer playing, but there is no evidence any one of them was disciplined or even counseled; (3) the investigation into Mr. Ly's role in the claimed soccer playing was cursory at best; and (4) Respondent provided no evidence to support Mr. Olea's belief that Mr. Ly had condoned any alleged soccer playing.[50]

In these circumstances, I cannot find that Respondent has demonstrated it would have discharged Mr. Ly even in the absence of his protected conduct. Accordingly, I find that by discharging Mr. Ly on August 18, Respondent violated Section 8(a)(3) and (1) of the Act.

Conclusions of Law

1. Respondent is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent violated Section 8(a)(3) and (1) of the Act on August 18 by discharging employees Mr. Bui, Loi Nguyen, Phuong Nguyen, Mr. Trinh, Mr. Vong, and Mr. Ly.
4. Respondent violated Section 8(a)(1) of the Act by threatening employees that Respondent would close its business if the Union came into the company, by asking an employee if he had signed a union card, and by engaging in surveillance of employees' union activities.
5. The unfair labor practices set forth above affect commerce within the meaning of Sections 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

Remedy

Having found that Respondent has engaged in certain unfair labor practices, I find it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent having discriminatorily discharged employees Mr. Bui, Loi Nguyen, Phuong Nguyen, Mr. Trinh, Mr. Vong, and Mr. Ly on August 18, 2005, it must offer them reinstatement insofar as it has not already done so and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of suspension and/or discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[50] Even accepting Mr. Olea's testimony that he was informed Mr. Ly knew of the soccer playing, there is no evidence Mr. Olea had any basis for believing that Mr. Ly condoned or failed to restrain it. On the contrary, Mr. Galan's testimony suggests he believed Mr. Ly had spoken to employees about soccer playing, and it is reasonable to assume that if Mr. Galan said anything to Mr. Olea about Mr. Ly, he conveyed that belief.

The General Counsel requests that the order herein include a special remedy requiring Respondent to read the notice to employees. Although Respondent has engaged in serious unfair labor practices, the Board's traditional remedies provide a sufficient antidote. See *Yellow Ambulance Service,* 342 NLRB No. 77, slip op. 11 (2004). Therefore, I deny the request.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[51]

ORDER

Respondent, A and G Inc. d/b/a Alstyle Apparel, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging any employee for engaging in union or other concerted protected activities.

(b) Threatening employees that Respondent will close its business if the United Food and Commercial Workers Union, Local 324, United Food and Commercial Workers International Union or any other union comes into the company, by asking employees if they have signed a union card, and by engaging in surveillance of employees' union activities.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, insofar as it has not already done so, offer full reinstatement to Tuan Bui, Loi Nguyen, Phuong Nguyen, Frankie Trinh, Hung Vong, and Kiet Tuan Ly to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Tuan Bui, Loi Nguyen, Phuong Nguyen, Frankie Trinh, Hung Vong, and Kiet Tuan Ly whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.

(c) Expunge from its files any reference to the unlawful discharges of Tuan Bui, Loi Nguyen, Phuong Nguyen, Frankie Trinh, Hung Vong, and Kiet Tuan Ly and thereafter notify them in writing that this has been done and that the discharges will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

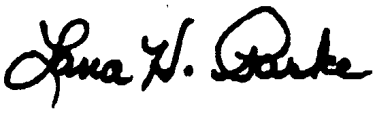
[51] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(e) Within 14 days after service by the Region, post at its facility in Long Beach, California copies of the attached notice marked "Appendix."[52] Copies of the notice, on forms provided by the Regional Director for Region 21 after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since July 15, 2005.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated: Washington, DC July 12, 2006



Lana H. Parke
Administrative Law Judge

[52] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX
NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT do anything that interferes with these rights. More particularly,
WE WILL NOT discharge any of you for supporting the United Food and Commercial Workers Union, Local 324, United Food and Commercial Workers International Union (the Union) or any other union.
WE WILL NOT threaten employees that we will close our business if the Union or any other labor organization comes into the company.
WE WILL NOT ask employees if they have signed a union card.
WE WILL NOT unlawfully watch our employees as they participate in union activities.
WE WILL NOT In any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights listed above.
WE WILL, within 14 days from the date of the Board's Order, insofar as we have not already done so, offer full reinstatement to Tuan Bui, Loi Nguyen, Phuong Nguyen, Frankie Trinh, Hung Vong, and Kiet Tuan Ly to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.
WE WILL, insofar as we have not already done so, make Tuan Bui, Loi Nguyen, Phuong Nguyen, Frankie Trinh, Hung Vong, and Kiet Tuan Ly whole for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Tuan Bui, Loi Nguyen, Phuong Nguyen, Frankie Trinh, Hung Vong, and Kiet Tuan Ly, and **WE WILL**, within 3 days thereafter, notify them in writing that this has been done and that the discharges will not be used against them in any way.

A AND G, INC., d/b/a ALSTYLE APPAREL

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

888 South Figueroa Street, 9th Floor

Los Angeles, California 90017-5449

Hours: 8:30 a.m. to 5 p.m.

213-894-5200.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 213-894-5229.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO BRANCH OFFICE
DIVISION OF JUDGES

A AND G, INC., d/b/a ALSTYLE APPAREL

and Case 21-CA-37029

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL NO. 324, UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION

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